

A **TAHAN STEEL CORPORATION SDN BHD**

v.

BANK ISLAM MALAYSIA BHD

B HIGH COURT MALAYA, KUALA LUMPUR
 ROHANA YUSUF J
 [CIVIL SUIT NO: D4-22A-48-2003]
 1 JUNE 2010

C ***BANKING:*** Banks and banking business - Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Defendant refusing to allow last drawdown of facility - Whether plaintiff failed to fulfil condition precedent of facility agreements - Failure of defendant to inform plaintiff regarding non-compliance with condition precedent - Defendant's conduct causing plaintiff to presume that condition precedent was fulfilled - Whether defendant's conduct amounted to repudiatory breach

E ***CIVIL PROCEDURE:*** Pleadings - Matters not pleaded - Introduction of evidence on matters not pleaded - Whether prejudicial to plaintiff's case - Whether court should consider issues

F ***CONTRACT:*** Breach - Damages - Nominal damages - Assessment of damages virtually impossible - Plaintiff awarded nominal damages of a token sum

G ***CONTRACT:*** Breach - Damages - Remoteness of damages - Losses caused to customer by bank's breach of Al-Istisnaa' facility agreements - Whether losses naturally arising from breach or within reasonable contemplation of both parties as likely to arise from such breach - Whether damages claimed too remote, indirect or unforeseeable - Damage for non-fulfilment of contract - Contracts Act, 1950, ss. 74 & 76

H ***CONTRACT:*** Breach - Fundamental breach - Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Defendant refusing to allow last drawdown of facility - Whether plaintiff failed to fulfil condition precedent of facility agreements - Failure of defendant to inform plaintiff regarding non-compliance with condition precedent - Defendant's conduct causing plaintiff to presume that condition precedent was fulfilled - Whether defendant's conduct amounted to repudiatory breach

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ISLAMIC LAW: *Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Defendant refusing to allow last drawdown of facility - Whether plaintiff failed to fulfil condition precedent of facility agreements - Failure of defendant to inform plaintiff regarding non-compliance with condition precedent - Defendant's conduct causing plaintiff to presume that condition precedent was fulfilled - Whether defendant's conduct amounted to repudiatory breach*

The plaintiff had undertaken a development project (the project) which was to be carried out on a piece of land ('the said Land'). The project was already afoot and the plaintiff had obtained financing from various sources. The defendant agreed to provide an Islamic financing facility of RM97,000,000 to part finance the project. The defendant was to purchase the project from the plaintiff for RM97,000,000 pursuant to an Al Istisnaa' Purchase Agreement (APA). Concurrently, the defendant was to sell the project back to the plaintiff under an Al Istisnaa' Sale Agreement (ASA) for RM185,360,000. Pursuant to the terms of the APA, the defendant disbursed the entire facility amount of RM97,000,000 into a Financial Project Account (FPA). From the FPA, the defendant had allowed drawdown on the facility in two tranches amounting to a total sum of RM58,715,984.84. The plaintiff claimed that the defendant had wrongly refused drawdown of the third tranche and that this amounted to a repudiation of the APA. The plaintiff accordingly accepted the repudiation *vide* its letter dated 26 April 2002 and now sought damages against the defendant for the alleged breach. The defendant alleged breach on the part of the plaintiff in failing to meet a condition precedent, namely, cl. 5.1(v) of the APA. Clause 5.1(v) required the plaintiff to satisfy the defendant that it had secured funding from a foreign Exim bank in an amount of USD80,000,000. The plaintiff contended that it had complied with cl. 5.1(v) when it produced a letter of offer for a financing facility from WestLB Bank. The plaintiff contended that the defendant by its conduct had accepted the WestLB's letter of offer as evidence satisfactory to the bank to prove that it has secured the foreign funding required under cl. 5.1(v). According to the plaintiff, even if WestLB's offer and acceptance was not compliant of cl. 5.1(v), the defendant had waived its right to insist on compliance by its very own conduct *ie*, when the defendant had disbursed the entire facility amount into the FPA, which the defendant was only to do upon compliance by the plaintiff of all the conditions precedent. The defendant had even allowed the plaintiff

- A to make drawdown on the facility in two tranches without any indication of non-compliance coming from the defendant. The defendant claimed that the said WestLB's letter of offer and acceptance was not sufficient. According to the defendant, the disbursement of the two tranches were not an acknowledgement and
- B acceptance of compliance of all conditions precedent by the plaintiff but was just that the defendant had granted a one-off waiver and indulgence respectively. In the course of trial, the defendant introduced other non-compliance of conditions precedent. The defendant also counterclaimed for the outstanding amount due
- C under the APA based on the amount disbursed.

Held:

- (1) The non-compliance of other conditions precedent, besides cl. 5.1(v), was not pleaded. The introduction of such evidence would be prejudicial to the plaintiff's case since, amongst other things, the plaintiff would have been taken by surprise thereby eliminating the element of fairness. During the numerous case managements, the issue had been thoroughly deliberated, made clear to and agreed by both parties. Thus, the court should not be invited to consider issues that were not agreed upon; *State Government of Perak v. Muniandy* (refd). (para 6)
- (2) The plaintiff had never been informed that the WestLB's offer letter was insufficient to constitute compliance. Thus, though the phrase evidence satisfactory to the bank in cl 5.1(v) conferred discretion on the defendant to determine what may amount to satisfactory evidence, the failure to communicate the same was detrimental to the defendant's case. From all account, the assertion by the defendant that it had granted a one-off waiver and indulgence appeared to be an afterthought. Communicating to the plaintiff was absolutely necessary because the conduct of the defendant had caused reasonable presumption on the part of the plaintiff that it had fulfilled all the necessary conditions precedent. A waiver or indulgence on a material fact in issue should be clear and unequivocal and in writing. (para 19)
- (3) The plaintiff had discharged its burden in proving that the refusal or withholding of the drawdown on the facility for the third tranche by the defendant was without justification. The refusal or withholding amounted to a breach of the APA which entitled the plaintiff to treat the same as repudiation. (para 28)

- (4) Under s. 74 of the Contracts Act, 1950 ('CA50') the damages entitled to be claimed by the plaintiff must be foreseeable loss which naturally arose from the breach by the defendant or which the parties at the time of making the contract know to be the likely result from the breach. The principle used is based on the damages arising from the breach which is within reasonable contemplation of the parties to be the loss as likely to arise as a result of such a breach. The damages claimed cannot be remote, indirect or unforeseeable. Under s. 76 of the CA50 a person who rightly rescinds a contract is entitled to compensation for any damage sustained through that non-fulfilment. (para 32) A
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- (5) The financing by the defendant of RM97,000,000 was only to part finance the project undertaken by the plaintiff. The project required a further foreign financing to the tune of USD80,000,000. There was no evidence to suggest that the failure of the project would be contributed solely by the breach of the defendant for failing to allow a drawdown of the third tranche. (para 35) D
- (6) Although, the plaintiff suffered damage resulting from the defendant's breach, the assessment of damages was virtually impossible. Thus, the plaintiff was only awarded nominal damages of a token sum of RM50,000. (para 42) E
- (7) The plaintiff did not deny receiving drawdown of the two tranches amounting to RM46,116,596.07 and RM12,099,33.77 respectively. There was no other defence raised by the plaintiff except breach by the defendant. Thus the counter claim was allowed and the amount due to be paid by the plaintiff was to be based on the total sale price under the ASA adding other costs allowed thereunder, deducting the undrawn portion plus profit and deducting the payment made by the plaintiff. (para 44) F
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- Case(s) referred to:** H
- Alghussein Establishment v. Eton College* [1991] 1 All ER 267 (**refd**)
- Bank Bumiputera Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 SC (**refd**)
- Bank Islam Malaysia Bhd v. Azhar Osman & Other Cases* [2010] 5 CLJ 54 HC (**refd**)
- Bonham Carter v. Hyde Park Hotel* [1948] WN 89 (**refd**) I
- Bumiputra Commerce Bank Bhd Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781 CA (**refd**)

- A *Hadley v. Bexandale* [1854] 9 Ex 341 (*refd*)
Ismail & Ors v. Tayaballi Essaji and Ors AIR [1929] SIND 182 (*refd*)
KPM Khidmat Sendirian Berhad v. Tey Kim Sue [1994] 3 CLJ 1 SC (*refd*)
Lee Saw Kong v. Leong Cheng Chiang [1960] 1 LNS 56 HC (*refd*)
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577
CA (*refd*)
- B *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd*
[1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC (*refd*)
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC (*refd*)

Legislation referred to:

- C Contracts Act 1950, ss. 74, 76
Evidence Act 1950, s. 65(1)(c)

*For the plaintiff - Ganathan Pathmanathan (Olivia Loh with him);
M/s Ganathan Loh*

- D *For the defendant - Md Tajuddin Isa (Thayakugan R with him);
M/s Md Tajuddin & Co*

Reported by Amutha Suppayah

E **JUDGMENT**

Rohana Yusuf J:

- [1] This is a claim by the plaintiff against the defendant under an Al Istisnaa' Agreement, wherein the defendant granted to the plaintiff a financing facility in the sum of RM97,000,000. The plaintiff alleged that the defendant had breached the Al Istisnaa' agreement when it refused the plaintiff to make a drawdown of the third tranche of the facility. As a result of the said breach, the plaintiff now claims for damages. By way of counterclaim, the defendant demands from the plaintiff, the amount due and owing, being the total amount drawdown under the first and second tranche of the Istisnaa' Agreement.

Background Facts

- H [2] The plaintiff was incorporated as a single purpose vehicle to undertake the construction and development of a Steckel Hot Strip Mill Plant (the project). The project was to have been carried out on a piece of land situated in Mukim Kapar, Klang, Selangor Darul Ehsan (the said land). The project was already afoot, where the plaintiff had obtained financing from various sources, including a syndicated credit facility offered by Sime Merchant Bank Berhad for

the sum of RM300,000,000. The plaintiff had also entered into a contract for supply and services with VAI Consortium, (VAI contract) the main contractor for the project, to undertake the supply of equipments, provisioning of engineering, civil works, erection and other services on turnkey basis. This contract is valued at EURO101,050,000 (RM121,480,000).

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[3] In order to reduce the local portion of the financing, the defendant, at the request of the plaintiff, agreed to provide a facility in the sum of RM97,000,000 to part finance the construction and development of the project. The financing was granted pursuant to an Islamic financing arrangement known as Al Istisnaa'. Under the Al Istisnaa' arrangement the defendant was to purchase the project from the plaintiff for a sum of RM97,000,000 upon the terms and subject to the conditions contained in an Al Istisnaa' Purchase Agreement (APA). Concurrently, the defendant was to sell the project back to the plaintiff under an Al Istisnaa' Sale Agreement (ASA) at an agreed price of RM185,360,000 payable by way of quarterly instalments. The parties had on 15 April 2001 sealed their intentions in the following documents;

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(a) the Al Istisnaa' Purchase Agreement (APA)

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(b) the Al Istisnaa' Sale Agreement (ASA)

(c) the deed of assignment in respect of the said land (DOA)

(d) the debenture

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(e) the corporate guarantee

(f) the directors' guarantee

(g) the memorandum of deposit of investment account certificate executed by the plaintiff in favour of the defendant for the sum of RM1,000,000 (MOD)

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(h) the deed of assignment on insurance policy taken out in respect of the project;

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(i) the deed of assignment of performance bond taken out in respect of the project;

(j) the shareholders' support agreement; and

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(k) the shareholders' undertaking.

- A [4] Pursuant to and in accordance with the terms of the APA, the defendant disbursed the entire facility amount of RM97,000,000 into an account known as the Financial Project Account (FPA). From the FPA, the defendant had allowed drawdown on the facility in two tranches amounting to a total sum of RM58,715,984.84. The first tranche was for an amount of RM46,116,596.07 while the second tranche was for RM12,599,338.77, leaving a third tranche yet to be drawdown. The defendant is alleged to have wrongly refused or withheld drawdown of the third tranche. The plaintiff contended that the refusal amounted to a repudiation of the Al Istisnaa' arrangement or more particularly the APA. The plaintiff accordingly accepted the repudiation *vide* its letter, at p. 414 of bundle B, dated 26 April 2002 and is now seeking damages against the defendant for the alleged breach.
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- D [5] One year after the plaintiff accepted the alleged repudiation of the APA, the defendant responded by a letter, at p. 420 of bundle B, accepting the plaintiff's termination. In the said letter the defendant in turn alleged breach on the part of the plaintiff for failure to meet a condition precedent, namely, the condition precedent in cl. 5.1(v) of the APA (hereinafter referred to interchangeably as "cl. 5.1(v)" or "the condition precedent in question"). Clause 5.1(v) requires the plaintiff to satisfy the defendant that it had secured funding from a foreign Exim bank in an amount of USD80,000,000.
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- F [6] In the course of trial however, the defendant gradually introduced other non-compliant conditions precedent, one of which was, the requirement for an injection and maintenance of certain amount of equity in the plaintiff. Before I proceed to elucidate the issue of non-compliance under cl. 5.1(v), it would be appropriate to bring to the fore matters arising in the case for the defendant. From the pleading and in the course of case management, the agreed issue for trial is and was, the non-compliance of the condition precedent in question and no other. To my mind, it would not therefore be proper for the defendant to raise issues that were not agreed, based on facts that were not pleaded, while in the course of trial. Needless to say, it is trite law that parties are bound by their pleadings. The case cited to me by learned counsel for the plaintiff Encik P Gananathan (Cik Olivia Loh, with him) is good authority on point. I therefore stand guided by the Appeal Court's decision in *State Government of Perak v. Muniandy* [1985] 1 LNS 117. In that
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case, the respondent, an employee of the appellant hitched a ride on a JKR lorry driven by a JKR driver who is also an employee of the appellant. The respondent was injured when the lorry met with an accident. The respondent claimed for damages from the appellant. It was not pleaded in the defence that there was a prohibition affecting employees of the appellant and that the driver had allowed the respondent to travel in the lorry in breach of such prohibition. The appellant was found to be vicariously liable as the court held that failure to plead that there was such a prohibition could not avoid liability because parties are bound by their pleadings.

[7] In the present case the non-compliance of other conditions precedent, besides cl. 5.1(v), was not pleaded. The introduction of such evidence, I believe, would be prejudicial to the plaintiff's case since, amongst other things, the plaintiff would have been taken by surprise thereby eliminating the element of fairness, which is the cornerstone of our system of justice. More so considering that during the numerous occasions when case management were conducted, the issue had been thoroughly deliberated, made clear to and agreed by both parties. Thus, it is my view that this court should not be invited to consider issues that were not agreed upon. To do so would cause this court to continue to consider issues that may arise from time to time as the trial proceeds and this may lead this court to depart from the course originally intended. To avoid such complication, this trial should be strictly confined to issues agreed upon and arising from facts pleaded by the parties. Accordingly therefore, the issue to be determined is whether there was compliance of cl. 5.1(v) and if so, whether there was a breach of the APA by the defendant when it refused drawdown of the third tranche of the facility.

The Plaintiff's Case

[8] It is plaintiff's contention that it had complied with the clause in question. It had done so when it produced a letter of offer for a financing facility from WestLB Bank (hereinafter referred to interchangeably as "WestLB" or "foreign financing"), in the sum equivalent to 85% of the value of the VAI contract. The said letter of offer is found at pp. 102 to 107 of bundle B. The offer was duly accepted by the plaintiff as per its letter of acceptance found at p. 108 of bundle B. The plaintiff had in fact submitted the said letter of offer and acceptance thereof to the defendant as evidence

- A of it having secured the foreign financing. The plaintiff contended that the defendant by its conduct had accepted the WestLB's letter of offer as evidence satisfactory to the bank to prove that it has secured the foreign funding required under cl. 5.1(v).
- B [9] It is the plaintiff's case that even if WestLB's offer and acceptance is not compliant of cl. 5.1(v), the defendant had waived its right to insist on compliance by its own very conduct. In support of this argument, the plaintiff points to the fact that the defendant had disbursed the entire facility amount into the FPA,
- C which the defendant is only enable to do under cl. 3.1 of the APA, that is, upon compliance by the plaintiff of all the conditions precedent. Emphasis was further stated on the fact the defendant had even allowed the plaintiff to make drawdown on the facility in two tranches without any indication of non-compliance coming from
- D the defendant. The plaintiff also pleaded estoppel against the defendant. From the conduct of the defendant as stated above, the plaintiff says the defendant should be estopped from raising non-compliance of the condition precedent in question.

The Defence

- E [10] On the other hand, the defendant's case is that the plaintiff had failed to meet the requirement under cl. 5.1(v) and therefore the defendant is justified to refuse the plaintiff drawdown of the third tranche. It is also the defendant's case that, the said WestLB's
- F letter of offer and acceptance by the plaintiff are not sufficient evidence satisfactory to the defendant to show that it had secured the foreign financing required under the condition precedent in question. At the hearing of the defendant's case, the defendant's witnesses DW1 and DW2, gave evidence as to what constitutes
- G evidence satisfactory to the bank under cl. 5.1(v). Both witnesses testified that evidence satisfactory to the bank means having in place a financing facility agreement between the plaintiff and WestLB with the facility made available for drawdown. Thus, a mere letter of offer and acceptance, according to the defendant's
- H witnesses, would not suffice. Besides, the defendant also asserted that though the offer by WestLB may have been accepted by the plaintiff, there was also a proposal by the plaintiff to substitute this requirement of foreign financing with an issuance of bonds locally for the amount of RM375,000,000. The defendant contended that
- I the said proposal in itself amounted to non-compliance with the condition precedent in question.

[11] The defendant admitted disbursing the entire facility amount into the FPA, and had allowed drawdown on the facility in two tranches. The defendant however contended that the disbursement and drawdown were not an acknowledgement and acceptance of compliance of all conditions precedent by the plaintiff. The defendant said that in disbursing the entire facility and allowing drawdown on the facility, it had granted a one-off waiver and indulgence respectively. As an explanation for the drawdown of the first tranche, the defendant said that it was allowed because of the urgency to redeem the said Land from Public Merchant Bank in order to secure the defendant's position while the drawdown of the second tranche was for payment of sums due to the suppliers. The defendant sought to rely on cl. 5.3 of the APA, wherein the defendant may waive its right and grant indulgences to the fulfilment of any condition precedent and such waiver or indulgences cannot preclude the defendant from enforcing its legal right thereunder.

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[12] Further to that, the defendant alleged that there was also an anticipatory breach on the part of the plaintiff, namely, that there would be a default in the payment of the facility by the plaintiff and that would deny the plaintiff from pleading estoppel by conduct against the defendant, since the plaintiff cannot come into equity without clean hands.

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Issues

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[13] Based on the brief facts above, the main issues before this court are these:

(i) whether there was compliance of cl. 5.1(v) and if so, whether there was a breach of the APA by the defendant when it refused or withheld drawdown of the third tranche of the facility; and

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(ii) whether the refusal of the drawdown of the third tranche amounted to a repudiation of the APA by the defendant and that the plaintiff is therefore entitled to accept its repudiation and claim for damages.

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Whether Condition Precedent Complied

[14] The relevant provision which deals with conditions precedent is found in art. 111 in the APA under the heading "Condition Of Disbursement Of Facility". Clause 5.1 of the APA stipulates that the plaintiff shall comply with all the conditions precedent for the

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A facility to be disbursed. The dispute between parties arose in relation to cl. 5.1(v). For convenience, the relevant clauses are set forth herein below.

5.1. Conditions precedent for disbursement of facility by Bank

B Notwithstanding any other provision herein contained, the following shall be conditions precedent for the Bank's obligation hereunder to disburse the Facility:

(a) The solicitor shall have confirmed that:

C (i) the Security Documents have been duly executed by the parties thereto and stamped and that they are valid, binding and enforceable against them;

D (ii) the Solicitors shall have applied for searches on the Security Parties at the Registry of Companies, the Official Receiver's Office and the Official Assignee's Office as the case may be and the Bank shall have received appropriate statutory declarations in respect of their winding-up status; and

E (iii) the Companies Act Form 34 in respect of the Deed of Assignment (Project Land), the Debenture, the MOD, the Deed of Assignment (Insurance) and the Deed of Assignment (Performance Bonds) have been filed with the Registrar of Companies;

F (b) to (u) ...

G (v) The Customer shall have submitted evidence satisfactory to the Bank that it has secured facilities totalling approximately USD80.0 million or such other amount as the Bank reasonable determines from foreign EXIM banks for the purpose of part financing the Project;

[15] From the reading of cl. 5.1(v) above, it is clear that to fulfil this condition precedent the plaintiff would have to submit evidence satisfactory to the bank that it has secured facilities totalling approximately USD80,000,000 or such other amount as the bank (the defendant) reasonable determines from foreign EXIM banks for the purpose of part financing the project. There is no definition as to what constitutes evidence satisfactory to the bank in the APA. It is also not disputed that the plaintiff was offered foreign financing by WestLB, which offer was duly accepted by the plaintiff and the same had been communicated to the defendant. The question

therefore is whether the defendant is right in saying that despite submitting such an offer, it still amounted to non-compliance because it is not evidence satisfactory to the bank as per the requirement under cl. 5.1(v).

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[16] The witness for the plaintiff, Encik Tai Hen Leng (PW1), informed the court that he had forwarded the WestLB's letter of offer and acceptance thereof and also informed the defendant that the plaintiff had accepted the offer. He believed that the said offer and acceptance amounted to fulfilment of cl. 5.1(v). His belief was further reinforced by a letter, at p. 193 of bundle B, advising disbursement by Messrs Mohamad Illiayas & Co, Advocates & Solicitors. The said letter was copied to the plaintiff. The last paragraph of the said letter states that "subject to fulfilment of all conditions ..." the defendant is to forward the redemption amount of RM46,116,596.07 to redeem the said land. Two days later the defendant by a letter, at p. 197 of bundle B, informed the plaintiff that the defendant had disbursed the entire facility amount of RM97,000,000 into the FPA and the first tranche amounting to RM46,116,596.07 had been drawdown for payment towards the redemption amount. Another drawdown in the amount of RM12,599,338.77 was made on 29 May 2001, at p. 295 of bundle B. From all these communications the plaintiff assumed that the defendant had accepted that the offer letter from WestLB and the acceptance thereof as evidence satisfactory to the bank and that the plaintiff had fulfilled the requirement under the condition precedent in question. PW1 testified that at all material times the defendant never raise any matter concerning non-compliance of any condition precedent. Neither did the defendant inform the plaintiff that the defendant had granted a one-off waiver and indulgences to the plaintiff for the disbursement of the entire facility into the FPA and for allowing drawdown on the facility in two tranches, respectively.

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[17] In their testimonies, both witnesses for the defendant testified that the WestLB's letter of offer and acceptance thereof by the plaintiff do not constitute evidence satisfactory to the bank under cl. 5.1(v). Therefore they maintained that there was non-compliance on the part of the plaintiff which justified the defendant to refuse or withheld drawdown of the third tranche. Encik Hamdan bin Bintang testified as the defendant's witness DW2. He was the General Manager in the Corporate Banking Division of the defendant at the material time. He said, he and his officer Encik

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- A Asrulhadi bin Yeop Aziz, who testified as DW1, granted a one-off waiver to the plaintiff in disbursing the entire facility amount into the FPA and an indulgence to the plaintiff in allowing drawdown on the facility in two tranches despite the non-compliance of cl. 5.1(v). In cross examination both witnesses were rigorously questioned and
- B they informed the court that they do not require the approval of a higher authority to grant such waiver and indulgence. They acknowledged the existence of the WestLB Bank offer to the plaintiff but in their view, it was not compliance. This is because, according to them, the offer from WestLB Bank was subject to
- C various conditions and that would not amount to evidence satisfactory to the bank for the purpose of showing that the plaintiff had secured the foreign financing required. In their testimonies also they said that the required evidence in satisfaction of cl. 5.1(v) would be a facility agreement, duly executed and made available for
- D drawdown.

Findings

- E [18] Clearly from the argument of counsel and testimonies of witnesses there is conflict in the interpretation of what constitutes evidence satisfactory to the bank under cl. 5.1(v). There is, as I have said earlier, no definition of the same in the APA but in its plain and ordinary language, evidence satisfactory to the bank would necessarily mean evidence acceptable to and at the sole discretion of the defendant. It is not disputed that the plaintiff was offered
- F financing by WestLB Bank which was duly accepted and communicated to the defendant but still, defendant maintains that this however did not amount to compliance of cl. 5.1(v).
- G [19] Without delving into the merits of the defence yet, if it is true that the defendant did not find the WestLB's offer and acceptance thereof to be evidence satisfactory to the bank, the plaintiff nevertheless cannot be faulted since at no point in time did the defendant ever inform the plaintiff that it required more than just the letter of offer and acceptance to satisfy itself under
- H cl. 5.1(v). It is clear from the testimonies of the defendant's witnesses that the plaintiff had never been informed that the WestLB's offer letter was insufficient to constitute compliance. In fact during cross examination, PW2 confirmed that the plaintiff was never informed that the defendant required more than WestLB's
- I letter of offer or more precisely, what the defendant's expectations were for the purpose of compliance. Further testimonies of PW2 on the issue in cross examination are as follows:

Q - Do you agree there was no notification by the Defendant in writing or otherwise that drawdown will be withheld until the EXIM loan financing was achieved? A

A - I agree

Q - Even in the Defendant's letter of 18.4.2002 at page 412, Bundle B - the Bank's agreement to release the 3rd Tranche is not conditional upon EXIM financing being achieved? Do you agree? B

A - No, disagree.

Q - I put it to you that the conditions precedent for EXIM loan financing was achieved by the Plaintiff. Do you agree? C

A - I disagree.

Q - Lets take for example the letter at page 359, Bundle B and page 363, Bundle B. Now, only the Plaintiff wrote letters. In both instances, the Plaintiff refers to meetings with you and confirmed various things or wrote to respond to various queries. Do you agree that in neither occasion did the Plaintiff write to you to justify any position in meeting the conditions precedent for EXIM loan? D

A - Yes, I agree.

Q - I put it to you that not only did you not put in writing that the conditions precedent had not been on the EXIM financing, the Defendant also never raised it with the Plaintiffs otherwise except for your request in your letters. E

A - Not in writing, I disagree.

Q - All this while, the Plaintiff was of the view that it had satisfied all conditions precedent and there was no issue in regard to EXIM financing. Do you agree? F

A - I disagree because we have been asking for the details on the EXIM loan.

[20] It is clear from the above testimony that there is admission by the defendant of its failure to inform the plaintiff that it did not find the WestLB's letter offer and acceptance to be evidence satisfactory under cl. 5.1(v). In the course of trial, there were attempts in vain by the witnesses for the defendant to allay the G

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- A effect of the absence of such failure. Both the witnesses tried to emphasise that the defendant had raised issues on the requirement of an agreement with WestLB when it inquired about the facility sometime in October, before the third drawdown notice was issued. PW1 for the plaintiff confirmed that the defendant did make some
- B general enquiry on facility and the project. The said enquiry was *via* a fax communication at p. 371 of bundle B. Upon perusal of the fax, it is clear that it is a letter of general enquiry. For convenience the said fax is hereby forwarded:

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Logo
Bank Islam Malaysia Berhad

To : Mr. Sunny Lee
VP Corporate 1, TSC Sdn Bhd

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From : AsnulHadi Yeop Aziz
Corporate Finance Department 1, BIMB

Date : 6 Syaaban 1422
23th October 2001

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Dear sirs,

Re: Issues Need To Be Addressed

Shareholder Agreement dated 9th April 1999 between TSC and Duferco International Investment Holding Ltd:

- F
- No Witness Signature
 - No Identity of the signatures
 - No Common seals accompanying the signatures
- G
- No Stamping on the agreement
 - Hence, the admissibility of the agreement is questionable

Shareholder Agreement between TSC and Go Asia (the venture capital)

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- No Signature & company seal of TSC
 - No Stamping on the agreement
 - No Witness Signature
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- Hence, the admissibility of the agreement is also questionable.

Financing agreement with WestLB (Exim Bank)

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- Any concrete agreement between TSC and WestLB beside the letter of offer and your acceptance letter.

Project Delay

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- Current project work schedule as compared to the original work schedule.
- Reasons for the delay of the project.

Thank you.

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Yours faithfully,
for Bank Islam Malaysia Berhad

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Asnulhadi Yeop Aziz
Manager

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Corporate Financing Development 1

[21] For all intents and purposes, this letter hardly addresses the issue of non-compliance of cl. 5.1(v). It lacks precision and in the circumstances, I dare say that no bank would be so lackadaisical in its approach to address an issue of such importance as non-compliance of the condition precedent. From the testimonies of both witnesses for the plaintiff and the defendant, it became clear that the said fax was sent because the defendant was embarking on an exercise of reviewing its lending portfolio. In fact in evidence the witnesses of both the plaintiff and the defendant admitted that at or around October 2001 the defendant had undertaken a review of its lending portfolio when its new chairman, Dato' Yusoff Nasir came on board. Thus the said fax was in fact sent to the plaintiff only for the purpose of making general enquiries on the progress of the project but was never intended to be a notice informing the plaintiff that cl. 5.1(v) remained unfulfilled. The plaintiff responded to the said fax and furnished a report on the progress of the project the day after receiving the same at p. 373 on 23 September 2001 and again on 24 October 2001, as at p. 375 of bundle B respectively. The defendant's witnesses also attempted to say that they had informed the plaintiff of the non-compliance verbally. However, I must make this observation that such evidence is untenable, considering that any confirmation under Condition of Disbursement of Facility of the Al Istisnaa' Agreement would necessitate notice in writing. Further, it is not an accepted practice of any bank to inform its client verbally on an issue of such importance involving a fully of such a substantial amount.

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- A [22] Thus, though I agree that the phrase evidence satisfactory to
the bank in cl. 5.1(v) confers discretion on the defendant to
determine what may amount to satisfactory evidence, the failure to
communicate the same is detrimental to the defendant's case. From
all account, the assertion by the defendant that it had granted a
B one-off waiver and indulgence appear to be an afterthought.

- C [23] It was argued by the learned counsel for defendant En Md
Tajuddin bin Md Isa (Encik Thayakugan R with him) that under
cl. 5(3) of the APA there is no requirement for the defendant to
notify the plaintiff of any indulgence granted. Under cl. 5.3 the
defendant may waive wholly or in part any condition precedent at
its absolute discretion and such waiver will not prejudice its right
under the APA. The court was invited by learned counsel to
D examine the said cl. 5.3. It is true that cl. 5.3 confers full discretion
on the defendant. However in the present circumstances
communicating to the plaintiff becomes absolutely necessary. I say
this because the conduct of the defendant had caused reasonable
presumption on the part of the plaintiff that it has fulfilled all the
necessary conditions precedent. Though I may be wrong, in the
E circumstances of the present case, I am of the view that a waiver
or indulgence on a material fact in issue should be clear and
unequivocal and in writing. It would be detrimental and least of all,
fair for a party to be led to believe that something that need to be
done has been done to the satisfaction of the other only to be told
F eventually that it was not the case but instead was merely a grant
of waiver or indulgence. In such a situation it would give undue
advantage to one at the expense of the other and the implications
are serious. For one thing, parties to a contract would have little or
no certainty in their dealings. One or the other would be
continuously wondering if having received no communication, or
G more particularly no notice, amounted to, compliance of the terms
of the contract or merely being granted waiver and or indulgence.
As it is in this case, the fact that the plaintiff had not been
informed of its failure to comply with any condition precedent and
H further affirmed by the fact that the plaintiff had not been informed
that it had been granted a one-off waiver and indulgence must have
surely assured the plaintiff, in its belief, that it had fully complied
with the requirement under cl. 5.1(v).

- I [24] There is no doubt that the defendant has discretion to grant
waiver or indulgence under the APA. However, it is my view that
defendant's failure to inform the plaintiff of a material fact suggests
that the defendant had not been earnest in its dealing, particularly

considering that its conduct was not in consonant with its stance on this issue. This is because firstly, despite saying that WestLB Bank's offer and acceptance thereof is not evidence sufficient to constitute compliance, the defendant nevertheless allowed drawdown of the first and second tranche of the facility. Even more peculiar is the fact that the defendant had earlier disbursed the entire facility amount into FPA, when under cl. 3.1 of the APA it would only be able to do so upon full compliance by the plaintiff. Secondly, the disbursement of the entire facility amount was made without any reservation despite the drawdown advice from Messrs Mohamad Illiayas & Co, at p. 193 of bundle B, advising that the defendant may disburse only upon "subject to all conditions" having been complied. By doing so, the defendant gave the impression that all conditions precedent had accordingly been complied with. Thirdly, in my view, a letter of offer by WestLB Bank duly accepted by the plaintiff are binding between the parties and would ordinarily denotes that the plaintiff had secured the financing from WestLB. Unless the plaintiff was informed otherwise, any reasonable person would, from the conduct of defendant, be making a similar presumption to that made by the plaintiff, namely, that the said letter of offer was evidence sufficient for the purpose of satisfying cl. 5.1(v). The defendant's conduct in allowing the drawdown on the facility in two tranches without any caveat to the plaintiff suggests not only did the defendant condone it but compliance had taken place as well. The situation would have been different if the plaintiff did not at all produce the offer letter on foreign financing. In such a situation the plaintiff would know for a fact that it has not complied with cl. 5.1(v) and any drawdown allowed thereafter would surely be on the basis of indulgence. It would be unreasonable in the circumstances to expect the plaintiff to know, without being informed, that despite tendering the WestLB Bank's offer letter, the defendant opined the same as non-compliance and more so, to know that the disbursement and the drawdown on the facility were made by the grant of a one-off waiver and indulgence.

[25] Given the facts and circumstances, I am of the view that the plaintiff had no reason to presume otherwise than having fulfilled the conditions precedent. Even when the third drawdown notice was issued, there was no response from the defendant to state in clear and unequivocal terms that the reason for refusing and or withholding the third drawdown was due to non compliance of cl. 5.1(v). In fact the very first time the defendant raised matters relating to the WestLB's offer was *vide* its solicitor's letter of 14 April 2003 in pp. 420 - 421 of bundle B, that is, one year after

- A the plaintiff's acceptance of the breach by the defendant as a repudiation of the APA. The failure of the defendant to notify the plaintiff of the non-compliance, and that it had granted a waiver and indulgence had led the plaintiff to rightly believe that it was entitled to the third drawdown.
- B [26] Be that as it may, it also escapes my imagination to understand why the WestLB's offer is not evidence sufficient for the purpose of satisfying cl. 5.1(v). It was argued by Encik Tajuddin that cl. 5.1(v) requires the plaintiff to show that the plaintiff has
- C executed an agreement for the foreign financing and that the facility thereunder was available for drawdown. The witness for the defendant DW2 also testified that compliance of cl. 5.1(v) requires
- D a loan agreement to be entered with the plaintiff in order to satisfy the defendant that the facility had been secured. This is because, according to DW2, WestLB's letter of offer is a conditional offer
- E since it is subject to a whole host of conditions and without a loan agreement in place there would not be a possibility of drawdown to ensure that the plaintiff had indeed secured the foreign financing. Even if I were to accept this argument, and that the defendant may
- F be adopting a very prudent standard in its practice and approach, two things come to my mind. First, the defendant had failed to inform the plaintiff, let alone specify such a requirement. Secondly, the defendant ought to know that, at least at the time it was making enquiry on foreign financing in October 2001 or even when
- G the drawdown notice for the third tranche was issued, there was yet no necessity for the utilisation of the foreign financing. The defendant had been, at the onset, made aware of the sequence of financing and time line of the project. The plaintiff's investment proposal that was submitted to the defendant (p. 109-119 bundle B)
- H shows that the other financing components, including the foreign financing, would only be needed after the full utilisation of the local financing. This is clear from the testimonies of the defendant's witness DW1, who confirmed plaintiff's witness PW1's evidence that the foreign financing would only be required after the full utilisation
- I of the facilities provided by the defendant. Bearing this in mind, it would not make commercial sense to expect the plaintiff to execute an agreement for the foreign financing even before the utilisation of the defendant's facility had been completed and when there was no need for it. That would involve unnecessary cost to the plaintiff as well as take away other financing options and possibilities that the plaintiff was in fact exploring, such as the issuance of bonds locally.

[27] The defendant also attempted to raise another aspect to this non-compliance. The defendant alleged that the plaintiff was going back and forth on whether to secure the foreign loan or to substitute it with the issuance of local bonds, and thus never intended to fulfil cl. 5.1(v). The facts and the background which I note on the plaintiff's proposal to substitute the foreign financing with the issuance of local bonds is this. The plaintiff had a meeting with the defendant's representative. This meeting was documented by the plaintiff *vide* a letter to the defendant dated 4 October 2001, at p. 359 of bundle B. In para. 3 it noted that there was a proposal by the plaintiff, for the WestLB portion to be replaced by issuance of local bonds in the amount RM375,000,000 because it would be cheaper and therefore more beneficial to the project. However, despite this discussion PW1 maintained that the Exim loan position remained intact. In fact in his testimony PW1 explained that in the same meeting, he informed the defendant that despite his proposal of local bond issue, the accepted foreign loan offer remained in place. It is also noted that the WestLB's offer remained good when it wrote at p. 364 of bundle B on 18 October 2001, seeking plaintiff's confirmation on whether the plaintiff intends to make use of the offer for financing. From the evidence also the substitution issue was in fact held up by the defendant. Thus I cannot find any justification, in the defendant's argument, that the deliberation on the issuance of local bond to have any bearing on the alleged non-compliance, since at all material times the WestLB offer remained valid and effective.

[28] From all these, I can only conclude that the plaintiff had discharged its burden in proving that the refusal or withholding of the drawdown on the facility for the third tranche by the defendant was without justification. The refusal or withholding amounted to a breach of the APA which entitled the plaintiff to treat the same as repudiation. The defendant had, in waiting for eight months after the third drawdown notice was issued, acted in a manner far more reasonable than one would expect in the circumstances and even more so as a commercial entity, before treating the defendant's failure as a repudiation bearing in mind that any delay would certainly hamper the progress of the project. Therefore I hold that the plaintiff had rightly terminated the APA by its letter of 26 April 2002.

A Default Prior To Termination

[29] The defendant also contended that the plaintiff was in default under the APA prior to the termination and therefore had no right to make this claim. This is premised on the fact that the plaintiff had uplifted the fixed deposit of RM1,000,000 under the MOD which was to have been maintained during the tenure of the facility, at pp. 290 to 290 of bundle B). However it is noted that the defendant only wrote to the plaintiff some five months after the termination by the plaintiff, at p. 417 of bundle B, that is, on 11 November 2002. The defendant's letter states that the plaintiff was in default at the fourth quarter that is on 3 May 2002 by a sum of RM37,509.34. However, the fourth quarter was only due on 3 May 2002, and the plaintiff had terminated the APA on the account of breach by defendant on 26 April 2002. As such, I do not find this contention relevant to the issue at hand.

D Damages

[30] Having established breach of the APA by the defendant, the plaintiff claims for damages arising from the said breach pursuant to s. 74 of the Contracts Act 1950. The plaintiff in its statement of claim particularised the items for specific damages. Before the commencement of the trial, I have allowed these items for damages that are pleaded in the statement of claim to be amended, with no objection by En Tajuddin. The amended items of damages are as follows:

	Particulars of Loss and Damages	Amounts
G	A Payments made for the redemption of the said Land under the previous facilities provided by Sime Merchant Bank Berhad towards initial Project cost.	RM46,116,596.07
	B Payments made to suppliers and other local contractors.	RM12,599,388.77
H	C Payments due and owing to turnkey contractor as a debt (USD5,000,000.00 for cost of services rendered and USD300,000.00 for late payment at the exchange rate of RM3.526 per USD1.00)	RM18,687,800.00
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D Overpayment on instalments paid to the Defendant.	RM 83,229.69	A
Cumulative Total	RM78,247,014.53	

And/or in the alternative,

E Loss of profit (before tax) for two (2) years of production.	RM101,776,000.00	B
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[31] In the course of his submission, Encik Gananathan withdrew the alternative claim on loss of profit in item E above. There are other injunctive reliefs sought by the plaintiff which I will deal with in the foregoing paragraphs. C

[32] Under s. 74 of the Contracts Act 1950 the damages entitled to be claimed by the plaintiff must be foreseeable loss which naturally arose from the breach by the defendant or which the parties at the time of making the contract know to be the likely result from the breach. The principle used is based on the damages arising from the breach which is within reasonable contemplation of the parties to be the loss as likely to arise as a result of such a breach. The damages claimed cannot be remote, indirect or unforeseeable. Under s. 76 of the Contracts Act, 1950 a person who rightly rescinds a contract is entitled to compensation for any damage sustained through that non-fulfilment. D E

[33] The Malaysian cases on the damages claimed against a bank for breach under a loan agreement are dealt with in two reported cases, which I will now appraise in dealing with this issue. In the case of *Bumiputra Commerce Bank Bhd Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781, the brief facts are these. The bank provided an overdraft of RM5,000,000 which was made for specific purpose. The purposes of the loan in that case was to complete the purchase of land, to pay for expenses related to converting the land from agriculture category to residential, the cost of subdivision of the land, and to finance the infra structure costs. The subdivided land would later be sold for profit. The bank wrongly recalled the facility and demanded repayment of the disbursed amount. The bank was sued for breach and the developer in that case claimed for damages. The High Court found that there was a breach by the bank and awarded damages in the sum of RM29,279,017.58. On appeal the Court of Appeal upheld the High court decision on the finding of breach of agreement. As to damages the Court of Appeal held that the loss of profit was rightly granted as an item of damages. The court held F G H I

- A that the developer in that case had established that it was damages which naturally arose from the breach by the bank and was within the contemplation of the parties as likely to arise from the breach. The Court of Appeal held that the damages granted was within the measurement encapsulated in the established principle of *Hadley v.*
- B *Bexandale* [1854] 9 Ex 341 which is incorporated into s. 74 of the Contracts Act 1950. The Court of Appeal allowed loss of profit as an item acceptable as a direct result contemplated by parties and rejected the argument forwarded by counsel that the loss that the plaintiff should be entitled to claim was to be based on the
- C difference between costs of substituted loan in the market. The court of Appeal referred and followed the principle in the Supreme Court case of *Bank Bumiputera Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495.
- D [34] In *Mae Perkayuan*, the Supreme Court awarded loss of profit as damages in relation to a breach by the bank to provide the bridging loan facility for a housing project in Terengganu. In awarding the quantum for loss of profit the court based the quantum awarded on the evidence by the Quantity Surveyor who prepared the project costing. In his calculation the Quantity
- E Surveyor showed that the housing project would have brought a profit of RM5,300,000 and this sum was allowed as damages. The Supreme Court in that case referred to the treaties of damages in *12 Halsbury's Law of England* where it was stated that, damages for
- F breach of contract to lend money may be nominal or substantial depending on the circumstances of the case. The cost of raising money elsewhere may be recoverable as a natural result. In the *Mae Perkayuan* the Supreme Court found that the loss of profit on housing project which the borrower would suffer was natural and
- G probable result of the breach by the bank. The loss of profit was allowed as an item of claim but it will have to be assessed by the court.
- H [35] Before I proceed to deliberate on the items of damages particularised by the plaintiff here, there are distinctions that need to be drawn between the facts of the present case with the two decisions. I note that unlike *Mae Perkayuan* and *Chendering Development* the financing by the defendant of RM97,000,000 in the present case, was only to part finance the project undertaken by the plaintiff. The project required a further foreign financing to the tune
- I of USD80,000,000. There is no evidence before me to suggest that the failure of the project would be contributed solely by the breach of the defendant for failing to allow a drawdown of the third tranche

for the amount of RM31,556,829.06. It would also be highly improbable to my mind, to contribute the project failure to the non drawdown of this amount to a project of such magnitude. The situation in this case is unlike the two cases above where it is quite clear from the facts that the withholding of funding by the bank had caused the project therein to fail. In both the cases, the objective of financing is known to the parties. Similarly, in the present case the objective is also known to parties. The objective of the present financing of RM97,000,000 is to part finance the project which means, that there would be a series of subsequent financing before the project is completed. The drawdown is to be made in three tranches. Each drawdown was for a particular purpose. In evidence it is clear that the first drawdown was to redeem the said Land and the second drawdown is for the payment to suppliers. In fact, it is clearly spelled out in the Recital D, of the APA that the objective of the facility, is firstly, to redeem the said Land while the other portions are for the purpose of financing part of the development of the project, but not the entire project, till its completion.

[36] Returning to items of plaintiff's claim, the plaintiff particularised the items of damages and contended them to be based on direct losses suffered when the defendant refused to allow the third drawdown. I will now delve into each of the items.

[37] Under item A, the plaintiff claimed as damages the amount used for redemption of the said Land, which essentially was the first tranche amounting to RM46,116,596.07. On this item of claim, first, I agree with the contention of Encik Tajuddin for the defendant that this cannot be a loss to the plaintiff. This amount is in fact a direct benefit to the plaintiff, consequential to the performance and not a breach by the defendant of its obligation under the APA. By allowing the first drawdown the defendant was in fact fulfilling its obligation under the APA, which obviously benefited the plaintiff. Under the APA in the recital D, it stipulates clearly that the facility of RM97,000,000 was "firstly to redeem the Project Land (said Land) from the Present Assignee ..". Thus to my mind it would be wrong, to state this item as a loss to the plaintiff resulting from the breach by the defendant. Over and above that, the evidence shows that the said Land was purchased by the plaintiff from PKNS at the purchase price of RM22,029,130.60 (see sale and purchase at p. 1-20 of bundle B). According to the plaintiff's own testimony the current market value of the said Land

- A is between RM125,000,000 to RM130,000,000. The plaintiff is presently enjoying the benefit of the appreciation in the value of the said Land and that can never be regarded as a loss in any event. Thus this item of claim must fail.
- B [38] The drawdown of the second tranche of the facility by the plaintiff, which is stipulated under item B, was towards payment of the suppliers for the sum of RM12,599,388.77. As in the case of the first tranche, this amount was drawdown as a result of the performance of the defendant's obligation under the APA. In cross examination PW2 (when referred to pp. 571- 572 of Bundle B2)
- C testified that they are payment to contractors and suppliers of earthwork, structure, and so forth for the improvement of the said Land including valuation and administrative cost and they are works already carried out on the project. In re-examination PW2 gave
- D somewhat an unconvincing answer that the structure of the project was removed because of non-payment. Besides, there are discrepancies in the plaintiff's documents and evidence. The certification by the plaintiff's consultant Messrs R. Singh & Associate, at pp. 300 to 316 bundle B2, was dated 23 June 2001
- E after the second tranche was drawdown and it does not relate to certification of all claims by contractors and suppliers shown in pp. 571- 572 bundle B2. PW2 confirmed that the certification of claims of the second tranche by Messrs R. Singh & Associates was not tendered in court. The closing balance as at 31 March 1998 at
- F RM22,429,852.33 does not tally with closing balance at 31 December 1997 and the explanation of PW2 was that there are no supporting documents because the sum had been settled in 2001. The rest of the vouchers and payment were not tendered and the explanation was that they were destroyed in a flood but yet neither
- G police report nor insurance claim was produced in support thereof. The failure of the plaintiff to furnish a viable explanation of the missing primary document denies the plaintiff from the exception under s. 65 of the Evidence Act, 1950 to tender secondary documents. This is also the decision in *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* [1994] 3 CLJ 1 which holds that when
- H tendering documentary evidence, the primary evidence must be adduced except in cases under s. 65, unless admitted by the other party the primary evidence is the writing itself. Here, the plaintiff had not satisfactorily accounted for the non production and no
- I evidence was led to show that reasonable effort had been taken by the plaintiff to come under the exception under s. 65(1)(c) of the

Evidence Act, as decided in *Kesang Leasing Sdn Bhd v. Dato' Haji Mat @ Mat Shah Hamad & Ors.* Thus, this item of claim even if claimable remains unproven. A

[39] In item C, the plaintiff claimed for payments due and owing to turnkey contractor in the sum of USD5,000,000 being cost of services rendered and USD300,000 for late payment charges (at the exchange rate of RM3.526 per USD1.00). On this item the plaintiff tendered in evidence the contract document of the VAI Contract at p. 36 of bundle B. This contract document was supplemented by Amendment No 1, at p. 317 of bundle B. It contains payment term in cl. 5.1.1.1.2 at p. 323 which refers to Invoice No 1504247 dated 12 February 1998 for a different contract no 0003/96. Under this clause payment of USD5,000,000 was to be paid *via* telegraphic transfer. For convenience the said clause is produced below: B C

5.1.1.1.2 The amount of USD5,000,000 - shall be paid *via* telegraphic transfer by the Buyer to VIA Austria in order to pay the outstanding invoice no. 1504247 dated Feb. 12th, 1998, amounting to USD3,420,000 - as per the Supply contract No. 0003/96, dated January 8, 1997 for services rendered by the Contractor, as well as to pay and reimburse VAI Austria for the preparation of the Beddows Feasibility Study, related travel expenses and costs incurred by VAI Austria for internal engineering hours for the period 1998 - August, 2001. D E

[40] PW1 when cross examined by Encik Tajuddin in reference to above clause agreed that USD3,420,000.00 was for a different VAI Contract. Meanwhile PW2 had at first disagreed that the receipts at pp. 445 and 446 of bundle B2 relate to a different contract number compared to VAI contract at p. 37-101 of bundle B, but later admitted his answer was wrong and in fact relate to different contract entirely. F G

[41] PW1, when pointed out by Encik Tajuddin that the amount due under this contract was seven years overdue, confirmed that there is no legal proceeding or arbitration pending under the contract against the plaintiff. I agree with Encik Tajuddin's submission that even if it is true that this amount is due, a defence of limitation would have set in for the plaintiff. Therefore the plaintiff did not suffer actual loss for that amount. Also if it is true that such amount is due, the plaintiff had not taken any step to mitigate that loss. The evidence of the plaintiff's witness on this issue is much wanting and highly inconsistent. In the end PW1 H I

- A maintained no payment was made till today to VAI Consortium because deferred payment was granted by VAI Consortium. However, when further questioned for any document to that effect, he said the documents were not in the bundle. The evidence of the witnesses for the plaintiff on this issue is inconsistent and do not appear credible. The plaintiff failed to prove this item of loss.
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- [42] Since Encik Gananathan had withdrawn the alternative claim for loss of profit I do not wish to dwell into that item of loss. Thus in view of the arguments and the evidence tendered above, I agree that the case of *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 cited by Encik Tajuddin applies in this situation. Edger Joseph J in that case held quoting L Goddard's dictum in *Bonham Carter v. Hyde Park Hotel* [1948] WN 89, which was approved by Thomson CJ in *Lee Saw Kong v. Leong Cheng Chiang* [1960] 1 LNS 56 that:
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Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court saying "This is what I have lost, I ask you to give me damages"

- E They have to prove it.

- Guided by the same case, though I know that the plaintiff would suffer damage resulting from the defendant's breach, the assessment of damages is virtually impossible. In the circumstances the plaintiff would only be awarded nominal damages. Looking at the circumstance and the amount of the contract involved, I am awarding the plaintiff a token sum of RM50,000 and allowing the claim of the plaintiff for that amount with costs, to be paid by the defendant.
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G **Other Reliefs**

- [43] Besides claiming for damages the plaintiff seeks other reliefs in para. 33 of the statement of claim. Since the prayers relate to the counter claim of the defendant for balance outstanding under the facility it would be appropriate for me to deal with them in the foregoing paragraphs.
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The Counterclaim By Defendant

- [44] The defendant is counterclaiming from the plaintiff for the outstanding balance due and payable under the APA based on the amount disbursed. The plaintiff argued that in view of the breach,
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the defendant would not be entitled to counterclaim the sum due under the APA and it should be dismissed. It was contended by Encik Gananathan that if the court is to restore the parties to a position as if no breach had occurred, the defendant should only be granted the actual amount disbursed, out of pocket expenses of RM58,715,934.84. He contended that the defendant should not be allowed to benefit from its own breach. This according to him, is the principle enunciated in the case of *Alghussein Establishment v. Eton College* [1991] 1 All ER 267 and adopted by the Court of Appeal in *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577. In this case the Court of Appeal disallowed a claim for compensation for a warehouse built without lawful authority in a land acquisition matter. The observation made by the Court of Appeal in that case is on the application of the general principle that a party ought not to be permitted to take advantage of his own breach. In my view the facts of the present case does not allow the application of this principle. In *Pentadbir Tanah Petaling* there is a breach of some regulation by the defendant which disentitled him to be compensated for the loss suffered as a result of failure to observe the local authority requirement. It is quite clear in the present case that the plaintiff benefited from the agreement from the amount drawdown as earlier discussed. The plaintiff admitted that the amount paid pursuant to the drawdown on the facility was made for and on its behalf, and should be liable to pay them back. In the case of *Mae Perkayuan*, despite the breach by the bank which in fact had caused the total failure of the project, the court allowed the bank's claim for the outstanding balance under the loan agreement and held that the borrower was liable to pay. It is stated in *Mae Perkayuan* that the bank's claim for recovery of loan was entirely a separate matter from the borrower's claim against the bank. The Supreme Court in that case held that there is no ground in law to exempt borrower from liability to pay loan. The plaintiff did not deny receiving drawdown of the two tranches amounting to RM46,116,596.07 and RM12,099,33.77 respectively. There is no other defence raised by the plaintiff except breach by the defendant, though the same, I should add, cannot absolve the plaintiff of its liability. Thus the plaintiff should be held liable for the amount expended, and I have no hesitation in allowing the counter claim of the defendant.

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A [45] I will now deal with the other two reliefs in the prayers sought by the plaintiff. In para. 33 (2) and (3) of the statement of claim, the other two reliefs sought are the following injunctive reliefs:

B 33(2) a declaration that by reason of the lawful termination of the APA by the Plaintiff, the Defendant is not entitled to rely on or enforce the Security Documents as against the Plaintiff;

C 33(3) an injunction restraining the Defendant by itself, its agents, servants or howsoever otherwise from acting on, placing reliance or enforcing in whatsoever manner the Security Documents as against the Plaintiff.

D [46] The securities documents are for the purpose of securing the amount owing by the plaintiff to the defendant under the APA. Since I have allowed the counterclaim of the defendant, there is no valid reason to restraint the defendant from enforcing the securities documents. After all, the purpose of the security is to secure payment due by the plaintiff. In fact the courts in other jurisdiction have always discouraged any attempt to restrain a mortgagee from exercising its powers of sale and hold that the balance of convenience ought to be in favour of the creditor, regardless of whether there is an impending suit. I would think that this is because the mortgagee, usually being a financier, would be in a position to compensate any loss or damage suffered in the event that such exercise of power by the mortgagee is found to be wrongful. This is the position taken by the court in *Ismail & Ors v. Tayabali Essaji and Ors* AIR [1929] SIND 182 where it was held that an application for a permanent injunction by the plaintiff will have to fail.

G **Quantum Of The Counterclaim**

H [47] The defendant raised issue on the computation of the quantum of the defendant's counterclaim for failure of the defendant to take into account unearned profit of the amount not drawdown. The counter claim of the defendant is based on the sum under the ASA. Under the ASA the total sale price payable to the defendant by the plaintiff is RM185,360,000. The defendant produced a certificate of indebtedness at p. 1 of bundle B3 stating that the amount outstanding as the date therein is RM143,758,099.14. This figure is derived from the total of sale price under the ASA of RM185,360,000. The payment received of

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RM3,485,446.75 was deducted and adding miscellaneous cost advance of RM167,611.05 and further deducting the undrawn amount of RM30,414,061.05. I have deliberated at length on the quantum of claim in my earlier decision in *Bank Islam Malaysia Bhd v. Azhar Osman & Other Cases* [2010] 5 CLJ 54, where the quantum of claim will have to take into account of the unearned profit which has not become due to the bank. Following that principle, I have allowed the counter claim by the defendant with costs in the following terms. The amount due to be paid by the plaintiff is to be based on the total sale price under the ASA adding other costs allowed thereunder, deducting the undrawn portion plus profit and deducting the payment made by the plaintiff. The sum is subject to a deduction of the unearned profit in any, upon realization together with costs.

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